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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

JUAN HUYNH,

Plaintiff and Appellant,

v.

FARMERS INSURANCE EXCHANGE,  
INTER INSURANCE EXCHANGE,

Defendant and Respondent.

A149577

A151245

(Alameda County  
Super. Ct. No. RG16808072)

In these consolidated appeals, appellant Juan Huynh contends the trial court erred when it struck Huynh's malicious prosecution complaint under Code of Civil Procedure section 425.16 and dismissed his case as a strategic lawsuit against public participation.<sup>1</sup> Huynh also asserts the trial court's consideration of evidence defendant submitted on reply in support of its motion for attorney fees violated his right to due process, and the trial court erred in awarding attorney fees for efforts on the reply in support of the attorney fees motion.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

**A. The Trademark Action**

Gucci America, Inc. filed a complaint alleging causes of action for trademark infringement and counterfeiting against T&L T Shirt (T&L). This action was tendered to

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

T&L's insurer, Farmers Insurance Exchange, Inter-Insurance Exchange (Farmers), for defense and indemnity, and Farmers retained counsel and defended T&L and Huynh pursuant to a reservation of rights.<sup>2</sup> Farmers ultimately settled the trademark action with Gucci on behalf of its insureds.

### **B. The Action for Declaratory Relief and Reimbursement and the Cross-Complaint**

Farmers brought suit against Huynh and T&L for declaratory relief alleging it did not have a duty to defend or indemnify them in the trademark action. Farmers' first amended complaint added claims for reimbursement of defense fees, costs, and settlement expenses it incurred in the trademark action. Huynh's first amended cross-complaint for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing alleged Farmers breached its contractual duty to properly defend him in the trademark action. Huynh sought compensatory damages, punitive damages, and attorney fees. Huynh moved for summary judgment on Farmers' first amended complaint.

The parties settled the entire action pursuant to an integrated settlement agreement and release. The settlement agreement reflected the parties' desire "to settle and discharge all claims, causes of action, both in law and equity, embraced within the Action . . . ."

Under the settlement agreement, Farmers agreed to dismiss its first amended complaint with prejudice and pay Huynh and T&L costs and fees totaling \$61,917.60. Upon Farmers' payment, Huynh agreed to dismiss his first amended cross-complaint with prejudice. In consideration for Farmers' dismissal and payment to Huynh, the parties released and forever discharged each other from "the claims, liabilities and/or obligations based upon tort, contract, statute, rule or regulation or whether extra contractual, equitable or punitive in nature, whether known or unknown, which exist as of the effective day of this Agreement and are related to and alleged in the Action." Neither

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<sup>2</sup> It is not clear from the record when or how Huynh was made a party to the trademark action.

party admitted or conceded any of the factual allegations or claims for relief alleged against them, and each waived rights under Civil Code section 1542 as to unknown claims. Based on the agreement, they mutually requested dismissal of the entire action with prejudice.

### **C. The Malicious Prosecution Action**

Less than two months later, Huynh sued Farmers for malicious prosecution, claiming Farmers pursued the declaratory relief action without proper cause and with malice.<sup>3</sup>

Farmers answered, and then moved to strike pursuant to the anti-SLAPP statute, section 425.16. Farmers relied on the settlement agreement and release to argue that Huynh could not establish the declaratory relief action terminated in his favor as required to maintain a malicious prosecution claim. Farmers also argued Huynh could not establish a prima face showing of malice.

In opposition to Farmers' motion, Huynh submitted a declaration from his counsel in the declaratory relief action, Alan Martini. Martini declared it was his understanding that the parties had not released the malicious prosecution claim in the settlement agreement, and Huynh's obligation to dismiss his first amended cross-complaint was not a condition to Farmers' dismissal of its first amended complaint. Martini also submitted the settlement agreement in the trademark action and attempted to contrast its language with that of the settlement agreement with Farmers to show the dismissal covenants were not dependent. Pursuant to section 128.7, Martini had sent Farmers a letter in the declaratory relief action stating Farmers' first amended complaint was unfounded.

Based on the declaration, Huynh argued he had a probability of prevailing on the element of favorable termination because extrinsic evidence established questions of fact regarding: 1) whether the parties had released the malicious prosecution claim; and 2) whether Farmers' covenant to dismiss its first amended complaint was independent of Huynh's covenant to dismiss such that termination was in Huynh's favor because he

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<sup>3</sup> Huynh also originally sued Farmers' special claims representative, Mark D. Beers, but later dismissed him with prejudice. Mr. D. Beers is not a party to this appeal.

relinquished nothing of value to settle. Huynh also contended he set forth a prima facie case of malice.

The trial court granted Farmers' anti-SLAPP motion. It found the declaratory relief action terminated following a negotiated settlement agreement, and Huynh's dismissal of his first amended cross-complaint was part of the agreement that resolved all claims between the parties. The trial court determined Huynh could not meet his burden to show the declaratory relief action terminated in his favor.

Farmers moved for attorney fees under section 425.16, subdivision (c). The court awarded Farmers attorney fees of \$23,025 for the anti-SLAPP motion, \$2,925 for the attorney fees motion, and \$120 in costs. A judgment of dismissal with prejudice was entered awarding Farmers \$25,950 in attorney fees and \$120 in costs. Huynh appealed the order granting Farmers' anti-SLAPP motion and the judgment awarding attorney fees. This court consolidated the two appeals.

## **II. THE REQUEST FOR DISMISSAL**

These consolidated cases were originally scheduled for oral argument on January 16, 2019. On January 4th this court received a request from counsel for respondents to continue oral argument due to illness of counsel. Pursuant to that request, the court rescheduled argument for March 13, 2019.

On March 11, 2019, counsel for appellant filed a one-page judicial council form request for dismissal of appeal. In its entirety, the substance of that request states: "The undersigned hereby requests that the appeal filed on October 7, 2016 in the above entitled action be dismissed. [sic] and Appeal filed on 5-02-17 Appeal No. A151245 Appeals consolidated on June 28, 2017." No explanation of the reason for the dismissal was provided.

In response, this court directed the parties by letter to appear for oral argument as scheduled. In response to our letter, counsel for appellant filed a letter with this court the day before oral argument explaining that the request for dismissal resulted from a settlement reached between the parties during the weekend before the scheduled oral argument. The parties appeared as directed.

California Rules of Court, rule 8.244(a)(1) provides that when a civil case settles after a notice of appeal has been filed, the appellant who has settled must immediately file and serve a *notice of the settlement* with this court. If the case settles after the appellant receives a notice setting the case for oral argument, the appellant is also required to immediately notify the court *of the settlement* by telephone or other expeditious method. (Cal. Rules of Court, rule 8.244(a)(2), italics added.) This court received no such notice until counsel’s letter of March 12, 2019, the day before argument.

We will consider the request for dismissal. An appellant may not dismiss an appeal as a matter of right. (*Huschke v. Slater* (2008) 168 Cal.App.4th 1153, 1160 [imposing \$6,000 sanctions on attorney for unreasonable delay in notifying appellate court that parties had settled and dismissed the underlying case].) Rather, pursuant to California Rules of Court, rule 8.244(c)(2), “On receipt of a request or stipulation to dismiss, the court *may* dismiss the appeal and direct immediate issuance of the remittitur.” (Italics added.) Thus, dismissal is discretionary. Here, because the resolution of this case is highly fact specific and based upon an unusual set of circumstances, we grant the request.

## **DISPOSITION**

The appeal is dismissed.

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Siggins, P.J.

WE CONCUR:

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Fujisaki, J.

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Wiseman, J.\*

*Huynh v. Farmers Insurance Exchange*, A149577, A151245

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\* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.